No. 89-1560

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD MORRISON,
Petitioner

V.

STATE OF MAINE,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether an express pre-trial colloguy between the trial court and a criminal defendant concerning the dangers of self-representation is constitutionally required even when the record as a whole demonstrates that the defendant knowingly and intelligently waived his right to be represented by counsel at trial.

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The citation to the opinion of the Supreme Judicial Court of Maine in State of Maine v. Richard Morrison is State v. Morrison, 567 A.2d 1350 (Me. 1990). The Order of the Maine Superior Court, dated May 4, 1989 denying Petitioner's motion for a new trial, is unreported. Both opinions are reproduced in appendices to Petitioner's petition.

STATEMENT OF THE CASE

In 1987 the victim in this case reported incidents of sexual abuse by the Petitioner, her uncle, to a Florida psychologist who then notified authorities in Maine, where the incidents had taken place. According to the victim, in

1984, when she was twelve years old, and in 1985, when she was thirteen years old, the Petitioner, then a Maine state trooper, engaged in acts of sexual intercourse with her; and in 1987 the Petitioner engaged in offensive fondling of the victim.

In a jury trial in Maine Superior Court (Kennebec County), Petitioner was convicted of two counts of rape (17-A M.R.S.A. § 252(1)(A) (1983)), two counts of gross sexual misconduct (17-A M.R.S.A. § 253(1)(B) (1983)), two counts of unlawful sexual contact (17-A M.R.S.A. § 255(1)(C) (1983)), and one count of assault (17-A M.R.S.A. § 207 (1983)). On appeal the Maine Supreme Judicial Court vacated one of the unlawful contact convictions.

1. The Pre-trial Record.

The Petitioner was arraigned in August 1988. During the arraignment the following colloquy occurred between the court and the Petitioner in regard to counsel.

THE COURT: Mr. Morrison, do you have a lawyer?

THE DEFENDANT: No, sir.

THE COURT: Do you need some time to get one?

THE DEFENDANT: No, sir.

THE COURT: You're going to represent yourself?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Have you had an opportunity to go over the indictment?

THE DEFENDANT: No, sir, I haven't seen it.

THE COURT: Is that what you have in your hand?

THE DEFENDANT: Yes, sir.

THE COURT: Why don't we pass it for the moment and we will arraign you if you are prepared for arraignment after you have had an opportunity to do that.

THE DEFENDANT: Thank you, sir.

. . .

THE COURT: All right. Mr. Morrison? I take it, Mr. Morrison, you are aware of the fact that -- well, first let me ask you. I understand you wish to appear Pro se.

THE DEFENDANT: Yes, sir.

THE COURT: I take it that's your own choice and you're not asking to appear Pro se because of any financial problems?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Have you had an opportunity to go over the indictment?

THE DEFENDANT: Yes, sir.

The Petitioner was released on bail following his arraignment.

At the call of the criminal docket on January 6, 1989 the following colloquy occurred:

> THE COURT: Are you ready for trial?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you have counsel?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you requested counsel?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you want to try this case yourself?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You understand you have a constitutional right to have counsel appointed for you if you can't afford one?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you want to try the case yourself, that's your selection?
>
> THE DEFENDANT: Yes, sir.

2. The Trial.

Petitioner appeared for trial on January 31, 1989 and represented himself throughout the one-day trial. Petitioner extensively cross-examined the victim, making use of apparent discrepancies between her trial testimony and prior statements to the police and others and exploring possible motives for fabrication. (Trial Transcript, hereinafter Tr. at 39-126) He also presented witnesses and testified in his own defense. (Tr. at 136-160) At the conclusion of the case he moved for a judgment of acquittal (Tr. at 173) and argued to the jury (Tr. at 180-187). He also successfully objected to the admission into evidence of an incriminatory statement made during plea negotiations. (Tr. at 161-163)

3. The Post-trial Record.

After the jury had returned guilty verdicts on all seven counts of the indictment on January 31, 1989, the Petitioner was committed to jail pending sentencing. On February 3, 1989 the Petitioner was released on bail and three days later an attorney, Sumner Lipman, Esq., entered his appearance for the Petitioner. On February 9, 1989 the Petitioner, through counsel, filed a motion for a new trial, and on March 9, 1989 Petitioner's attorney filed a memorandum of law in which he argued, inter alia, that the failure of the trial court to provide "sufficient information regarding the dangers of self-representations" rendered his waiver of the right to counsel invalid.

A hearing on the motion for new trial was held on March 10, 1989 and May 1,

1989. During the course of the hearing the Petitioner testified that following his arraignment he "went down to the law library and opened up the Rules of Evidence." He then went to the District Attorney's office to obtain "discovery" materials relating to his case. (March 10, 1989 Hearing Transcript, hereinafter Tr. 3/10/89, at 5-6). On cross-examination Petitioner gave the following responses when questioned about his assertion that his waiver of counsel had not been knowing and intelligent:

> Q One of the grounds of the motion of your motion for new trial is that you proceeded pro se without an attorney. That was by your own free will, wasn't it?
>
> A Yes, it was.

Q In fact you didn't trust attorneys?

A That's correct.

Q And still don't?

A I dislike attorneys, that's correct.

Q So in terms of your proceeding through the legal system through the trial that was not through some ignorance on your part. That was a conscious free choice?

A I chose to represent myself, yes.

Q Your feeling was that you could represent yourself as well, or that the way you wanted to go through the system was representing yourself?

A I wanted to present myself, yes.

Q You were fully aware of the seriousness of the offense that were against you?

A Yes, I knew they were serious crimes.

Q In fact when you spoke to [the District Attorney] in his office he started to go through what each of those offenses meant, and you knew fully well even before he said anything as to what those offenses were?

A I knew, I have a 17-A, I knew what he was talking about, rape and that, yeah.

Q You understood the penalties for those offenses?

A I assumed you could get --

. . .

THE WITNESS: I assumed myself you could get 20 years for a Class A crime.

Q As you indicated you had a familiarity with title 17-A. This was because of your prior experiences as a police officer?

A Yes.

Q State police officer?

A Yes.

Q In fact had you ever been involved in either the investigation or a prosecution of felony offenses?

A I think I have had two Superior Court cases. Rest of them were traffic and district.

Q Again in terms of proceeding in pro se status you were -- did you at any time prior to trial contact a lawyer and discuss the case?

A My wife did behind my back, and I was upset with her, but I don't think I ever did that I can remember.

Q In fact there were a great number of people who suggested that you should get a lawyer, but you told each of them you didn't want a lawyer?

A That's correct.

Q In fact when you spoke with [the District Attorney] prior to trial he asked you to get a lawyer, did he not?

A Yes.

Q In fact he told you he would prefer to have you represented by counsel in terms of what would happen in the courtroom?

A He told me he would rather be talking to an attorney rather than a pro se.

Q In fact in terms of dealing with you as you say pro se one of the comments that you made in examination from [your attorney] was the fact you were fully aware of how, I think your language was, how [the District Attorney] operates, and he was trying to get a confession from him, is that correct?

A That's correct.

Q So is it fair to say in terms of your conversations with [the District Attorney] you knew he was an adversary?

A I don't know what you mean by the word, but I knew he was trying to get a confession out of me.

Q You knew you were on the other side?

A Right.

Q He was against you?

A He wasn't there to help me, correct.

. . .

Q Now you indicated one other thing. You indicated I think in your direct testimony that before going to trial you were convinced or you understood that if you represented yourself or you felt if you represented yourself it was very good chance you would be convicted, is that true?

A That's correct.

Q So you were fully aware of the danger of being convicted by your own representation?

A I felt with or without a lawyer I would be convicted. I was 80 percent sure. That's the number I kept telling [the District Attorney].

(Tr. 3/10/89 at 21-24, 47)

In the course of the hearing on the motion for a new trial, state police detective Donald Lizotte, a friend and former colleague of the Petitioner, testified that about a month or two before the trial he had had a conversation with the Petitioner in which he advised the Petitioner to get an attorney. (May 1, 1989 Hearing Transcript, hereafter Tr.

5/1/89, at 18-19) Detective Lizotte recommended a specific attorney and warned the Petitioner as follows:

> The thing about courtroom testimony is you may not be aware of what evidence the prosecution may be attempting to get in that may be in violation of your rights; whereas if you have an attorney he knows whether or not to object to something, where if you do it it may go through. And it may be just a little thing that puts you away.

(Tr. 5/1/89 at 20) However, Petitioner did not appear to be giving any serious consideration to this advice. (Tr. 5/1/89 at 20)

The District Attorney testified to a meeting he had with the Petitioner on January 17, 1989 where, at the behest of the court, he urged the Petitioner to get an attorney. (Tr. 5/1/89 at 29-20) The

District Attorney also provided the Petitioner with material explaining the court's sentencing guidelines. (Tr. 5/1/89 at 30) As recalled by the District Attorney, he advised the Petitioner that "it would be an unfair contest for him to represent himself in the courtroom" and that "whoever was trying the case would basically be going for his throat when we walked in the courtroom." (Tr. 5/1/89 at 32-33) He also went over the indictment with the Petitioner and explained the elements of the offenses. (Tr. 5/1/89 at 33) On two other occasions the District Attorney again attempted to persuade, and even "begged," the Petitioner to get an attorney. (Tr. 5/1/89 at 37) He warned the Petitioner that he was "ten thousand percent sure that he would be convicted of all of the charges." (Tr. 5/1/89 at 64)

4. The Trial Court's Findings.

Based on the evidence presented at the post-trial hearing the trial court made the following findings:

> The record indicates that, while the court may not have extensively inquired into the defendant's choice to represent himself, the defendant was repeatedly urged by friends, including members of the Maine State Police, to get counsel to assist him. His wife urged him to do the same, and at one time his wife contacted counsel only to have the defendant become angry with her when he found out about it. Further, in the month prior to trial, the defendant was repeatedly urged to seek assistance of counsel when he met with the District Attorney. During these times, the District Attorney advised the defendant of the risks of self-representation, the fact that he would be opposed by skilled counsel and the importance of having skilled counsel to assist him.

The evidence also indicates that the defendant disliked attorneys and, from early in the investigation, decided to represent himself without assistance of counsel. He persisted in this view despite very strong urgings of close friends and former colleagues on the State Police, his wife and the District Attorney throughout the investigation, preparation and trial of the case. Considering the extensive warnings given to the defendant regarding the risks of self-representation by his friends, family and the District Attorney, and considering his strongly held views critical of attorneys, it appears, therefore, that his decision to represent himself was carefully considered, strongly held and unlikely to have been changed by any comments which could have been made by the court at arraignment or otherwise. That being the case, the court determines that the defendant was knowledgeable of his right to counsel, and having considered the risks or at least having been made aware of the risks, he chose to represent himself.

The trial court further observed that the Petitioner "present[ed] himself in court and otherwise as a bright, self-confident, polite and knowledgeable individual."

The Maine Supreme Judicial Court's review of the record confirmed that "[a] plentitude of evidence support[ed]" the trial court's finding of a knowing and intelligent waiver even in the absence of "Miranda-like warnings" from the trial court itself. State v. Morrison, 567 A.2d at 1352-53.

REASONS WHY THE WRIT SHOULD BE DENIED

THE MAINE SUPREME JUDICIAL COURT'S DECISION, THAT THE RECORD SUPPORTED THE TRIAL COURT'S FINDING OF A KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL AT TRIAL, IS CONSISTENT WITH THE APPROACH OF THE FEDERAL COURTS OF APPEAL AND THE PRINCIPLES ESTABLISHED IN PRIOR SUPREME COURT DECISIONS AND IS A FAIR RESULT ON THE FACTS OF THIS PARTICULAR CASE.

The record of pretrial proceedings in this case reveals that Petitioner was expressly informed of his constitutional right to counsel at trial. Petitioner complains, however, that even though he was advised of his right to counsel he did not receive adequate warnings as to the risks of self-representation. The Maine Supreme Judicial Court relied extensively on the trial judge's evaluation of the Petitioner's apparent intelligence and on

the evidence presented at the post-trial hearing on the motion for new trial which demonstrated that the Petitioner had been warned of the risks of self-representation, albeit by friends, colleagues, his wife, and the District Attorney rather than the trial court. Petitioner, apparently ignoring the post-trial record, argues that "[t]he record is devoid of proof that the Petitioner knowingly and intelligently waived his right to counsel." Petition at 27. Petitioner seeks to have this Court declare, as a matter of federal constitutional law, that only a pre-waiver discourse between the trial court and the defendant regarding the dangers of self-representation can establish a knowing and intelligent waiver of the right to counsel.

1. The Decision Below Is Consistent with the Approach of the Federal Courts.

Contrary to Petitioner's suggestion there is not a substantial divergence of opinion among the federal courts regarding the precise question raised by Petitioner, i.e., whether, as a matter of federal constitutional law, a finding of a knowing and intelligent waiver may be found in the absence of a pre-trial inquiry by the court. Federal courts of appeal, while expressing a clear preference for a pre-trial inquiry by the trial court as to the defendant's understanding of the risks of self-representation, have, in the absence of such an inquiry, looked to the record as a whole to determine whether the defendant knowingly and intelligently waived his right to counsel. See United

States v. Campbell, 874 F.2d 838, 845-46 (1st Cir. 1989); United States v. Hafen, 726 F.2d 21, 25 (1st Cir.), cert. denied, 466 U.S. 962 (1984); United States v. Gallop, 838 F.2d 105, 109-111 (4th Cir.), cert. denied, 108 S.Ct. 2858 (1988); Wiggins v. Procunier, 753 F.2d 1318, 1320-21 (5th Cir. 1985); United States v. Moya-Gomez, 860 F.2d 706, 731-739 (7th Cir. 1988), cert. denied, 109 S.Ct. 3221 (1989); Berry v. Lockhart, 873 F.2d 1168, 1170 (8th Cir. 1989); Meyer v. Sargent, 854 F.2d 1110, 1113-1115 (8th Cir. 1988); United States v. Kimmel, 672 F.2d 720, 721-22 (9th Cir. 1982); Strozier v. Newsome, 871 F.2d 995, 997-98 (11th Cir. 1989); United States v. Fant, 890 F.2d 408 (11th Cir. 1989). Cf. United States v. McDowell, 814 F.2d 245, 248-49 (6th Cir.) (decision in this

case based on record as a whole but court invokes supervisory power to require specific inquiries in the future), cert. denied, 484 U.S. 980 (1987); United States v. Bailey, 675 F.2d 1292, 1311 & n.13 (D.C. Cir.) (same), cert. denied, 459 U.S. 853 (1982); United States v. Welty, 674 F.2d 185, 188-189 (3d Cir. 1982) (absent inquiry by court, record provided no basis for assessing validity of waiver); United States v. Padilla, 819 F.2d 952, 958-59 (10th Cir. 1987) (same).

For instance, in Strozier v. Newsome, supra (a case relied upon by Petitioner), no pre-trial colloguy on the dangers of self-representation was held. Rather than vacating the conviction, the Eleventh Circuit remanded the case for supplementation of the record because the

existing record was inadequate to determine whether there had been a knowing and intelligent waiver. Accord, United States v. Kimmel, supra, 672 F.2d at 721-72.

2. The Decision Below Is Consistent with the Principles Established in Prior Supreme Court Decisions.

Petitioner argues that Supreme Court decisional law supports the need for mandatory pre-waiver warnings regardless of what the record discloses as to the defendant's actual knowledge and understanding in choosing to represent himself. The Supreme Court decisions principally relied on by the Petitioner - Faretta v. California, 422 U.S. 806 (1975); Patterson v. Illinois, 487 U.S. 285 (1988); and Von Moltke v. Gillies, 332 U.S. 708 (1948) - provide, at best, weak support for Petitioner's argument. To be sure, Faretta

advises that for a knowing and intelligent waiver of the right to counsel at trial the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835 (internal quotation omitted). And Von Moltke teaches:

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

332 U.S. at 724 (plurality opinion). Yet neither case states that a specific pre-waiver colloquy is mandatory or that a

trial court is precluded from relying on its own observations about the defendant's intelligence and background and from engaging in a post hoc examination of the waiver. Nor do they indicate that the trial court, in evaluating the defendant's waiver, cannot consider the information imparted to the defendant by others or the defendant's own confirmation of his knowledge. Here the evidence at the post-trial hearing demonstrates that the specific information which Von Moltke prescribes was in fact conveyed to or already known by the Petitioner prior to the trial.

Petitioner's argument, that the Constitution requires, in all cases, a pre-waiver examination of a defendant by the trial court, is also not supported by

Patterson v. Illinois, a case which itself involved a court's after-the-fact examination of the validity of a defendant's waiver of his Sixth Amendment right to counsel in the course of a post-indictment police interrogation, where pre-waiver warnings were provided by the police, not the court.

Petitioner cites United States v. Moya-Gomez, supra, for the proposition that Patterson confirmed the existence of a constitutional requirement that the trial court formally explain the dangers of self-representation to pro se defendant. However, in Moya-Gomez the Seventh Circuit, while acknowledging the Patterson dictum relied upon by the Petitioner, actually concluded that in the absence of a "thorough and formal inquiry by the court,"

it is proper to look to "the record as a whole" to determine whether there was a knowing and intelligent waiver of the right to counsel. 860 F.2d at 731-39.

3. In View of the Fairness of the Result Reached by the Courts Below, This Is Not an Appropriate Occasion to Consider the Need for Constitutionally Mandated Procedures.

Notwithstanding any deficiencies in the pre-trial procedures followed by the trial court here, the particular facts and circumstances surrounding the Petitioner's waiver of his right to counsel demonstrate the fairness of the conclusion that the Petitioner's waiver was, in fact, knowing and intelligent. As observed by the trial court, Petitioner, a former state police officer with an admitted familiarity with the offenses with which he was charged and

the potential punishments, was adamant about handling his own defense. He was not a stranger to court proceedings and was fully aware that it would be an "unfair contest" and that the prosecutor would be "going for his throat." Yet he rejected the strong recommendations of his wife, his friends, and the District Attorney himself, that he seek counsel. At no time during the trial did Petitioner express any misgivings about his decision to represent himself. Only after he was found guilty did he decide to seek the services of an attorney.

Petitioner may well have reasoned that in view of the non-complex nature of the case - allegations of sexual abuse committed against his niece, whose testimony was largely uncorroborated - he

might fare better by questioning her himself. Or perhaps due to his dislike of attorneys he was willing to assume the risks of self-representation, no matter how substantial. Although Petitioner suggests that he may have made some mistakes at trial in representing himself, the existence of such mistakes does not go to the validity or effectiveness of his waiver. The question is whether his waiver was knowing and intelligent at the time it was made, not whether it appears in hindsight that the Petitioner made the right decision.

Regardless of the reasons for his decision or the ultimate consequences in terms of the quality of his performance at trial, there can be little question, based on the record as a whole, that Petitioner

made his choice of self-representation "with eyes open." The sort of formal pre-waiver warnings by the court which Petitioner argues should be required would have added nothing to the knowing and intelligent quality of the waiver here.

4. Summary

This is not a case in which the absence of a pre-trial inquiry by the trial court left the Maine Supreme Judicial Court with a silent or even ambiguous record from which to examine the validity of Petitioner's waiver. Based on the record as a whole the Maine courts fairly concluded that the Petitioner knowingly and intelligently waived his right to counsel at trial. This conclusion, based on the particular facts of this case, in no way violates the principles established in Von

Moltke and Faretta. Nor does the Maine courts' approach to the application of these principles differ from that of the federal courts of appeal. Thus, this Court should decline Petitioner's invitation to use this case to consider whether prophylactic Miranda-type pre-trial warnings by the trial court are constitutionally mandated in all cases.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: June 20, 1990

Respectfully submitted,

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